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ABSTRACT

Recently, some critics have argued that the academy has become infected by a new brand of censorship which threatens the openness central to a university's purposes. Dinesh D'Souza has argued that this censorship is a manifestation of influence enjoyed by leftist radical professors and students. D'Souza is correct that the First Amendment is being revised in the name of diversity. Three basic arguments for the abridgement of certain forms of speech on campuses must be considered. The cultural transmission argument states that when a society tolerates intolerant speech, negative behaviors and generational transmissions are induced. However, there is little empirical evidence to support this view. The "fighting words" and injured feelings view argues that minorities and women are injured by intolerant speech and thereby become unable to participate in university activities. This injury is weighed against freedom of speech. However, this argument has been found flawed in court because it is too broad and vague. The university as "special place" argument views the campus as a special environment in which values are imparted to students, but such a paradigm is problematic for a number of reasons. The policy has also been justified through analogy to Title VII of the Civil Rights Law, but this has been rejected in courts. Supporters of anti-discrimination codes have failed to give full consideration to these codes as censorship. Civility can not be legislated, and too much codification and litigation is detrimental to higher education. (Fifty-seven notes are attached.) (HB)

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An Examination of Revisionist Theories of the First Amendment Cited in Dinesh D'Souza's *Illiberal Education*: Arguments for Abridgement of Freedom of Speech on Campus to Protect the Educational Opportunities of Women and Minorities

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Universities traditionally have been assumed to be more tolerant of unpleasant speech than society at large, but in *Illiberal Education* [1]Dinesh D'Souza argues that the academy of the 1990s is infected by a "new censorship" which stifles the openness, robustness and lack of inhibition that are central to university discourse. D'Souza contends that this censorship is a manifestation of the influence enjoyed by activist professors and student groups who "seek a fundamental restructuring of American society" according to their leftist political agenda. The censorship is both formal, i.e., "anti-harassment" regulations, required "sensitivity training" sessions, and informal i.e., accusation and intimidation to silence those who question the "victims' revolution." D'Souza believes that university students learn from these practices that obtaining political power, rather than engaging in rational and civil debate, is the best way of settling disputes.[2]

While one can quarrel with the evidence D'Souza presents in support of his thesis--one prominent critic has noted that many of the book's sources are journalists, "wild-sounding professors" and "know-nothing students"[3]--one cannot so easily dismiss the revisionist theories of the First Amendment by the academic "New Censors" whom D'Souza cites. D'Souza is correct when he claims that many universities are abridging freedom of speech in the interest of enhancing "diversity": for example, more than 150 universities currently have codes which make punishable the utterance of racist, sexist or homophobic speech on campus.[4] The question is whether this "intolerance of intolerance" violates the notion of what a university is all about. D'Souza clearly believes that coerced "political correctness" ironically "breeds resentment and rebellion" among all racial and gender groups.[5]

D'Souza's sample of "New Censors" includes several university presidents, whom he scorns as weak-kneed accommodationists, and professors of law, whom he characterizes as radical advocates of the "victims' revolution"; he dismisses all of their arguments in a few pages. Some of their views are indeed extreme: for example,

the argument of Michigan law professor Alexander Aleinikoff that freedom of speech is a right extended only to victimized minorities, since the white majority does not need such protection.[6] The author of this paper knows of no university which has or would consider denying freedom of speech to an entire race of people in other to further diversity. Other arguments cited by D'Souza attempt to balance the right of free speech with the perceived need to protect the educational opportunities of women and minorities. Because such a balancing test has been incorporated into many university "hate speech" codes, these revisionist theories of the First Amendment merit examination in greater detail.

Specifically, this paper will discuss the views that certain forms of speech on campus should be abridged because:

(1) behaviors follow attitudes, so the way to establish nondiscriminatory attitudes is to establish institutional arrangements, i.e., university codes or even statutes, in which exploitative behaviors are no longer reinforced;

(2) freedom of speech on campus must be weighed against the need to protect the feelings of minorities and women;

(3) the university differs from society at large in its insistence on not only free expression but also an environment conducive to mutual engagement;

It is important to examine these arguments because universities continue to promulgate "anti-harassment codes" although federal courts struck down such codes at the University of Michigan in 1989[7] and the University of Wisconsin in 1991.[8] The unconstitutionality of Wisconsin's code, which was more narrowly drawn than Michigan's, represented a major setback for "diversity" activists, but they will continue to search for ways to legislate the atmosphere of "civility" on campus which they believe to be essential for equal educational opportunity for all students.

The cultural transmission argument

D'Souza cites the work of law professor Richard Delgado, an early advocate not only of university speech codes but also criminal liability and a new tort as weapons against racism. In a widely quoted 1982 article in the *Harvard Civil Rights-Civil Liberties*

Law Review, [9] Delgado contends that despite the popular perception that race relations have improved, the racial insult remains "one of the most pervasive channels through which discriminatory attitudes are imparted." [10] Framing a cultural transmission argument, Delgado argues that when a society or university tolerates intolerant speech, "not only does the listener learn and internalize the messages contained in racial insults, these messages [also] color our society's institutions and are transmitted to succeeding generations."[11] He further alleges that racist speech often causes minorities to adopt a defeatist attitude, thereby perpetuating a "tradition of failure." [12] More specifically, Delgado claims that discriminatory speech induces negative behavior in the listener, i.e., "impairing the victim's ability to form close interracial relationships" and creating self-fulfilling prophecies.[13]

Delgado's rationale has been incorporated into a number of university speech codes and has been extended to include sexist and homophobic speech. However, w hile his argument seems theoretically plausible, in fact it is supported by little empirical evidence. Psychologists Greenberg, Kirkland and Pyszczynski note this fact in their review of research on the effects of derogatory ethnic labels.[14] Sociological studies have demonstrated that minority students have a difficult time adjusting to life in predominantly white universities, but these studies do not indicate that hate speech is the only or even the primary cause of the minorities' alienation and self-doubt.[15] Perhaps the available social-science research methods cannot adequately document the "corrosive" effects of slurs and epithets on intergroup relations in the university.[16]

Delgado's article avoids the issues of censorship and First Amendment double standards,concluding that "a society whose public law recognizes harm in the stigma of separate but equal schooling...should also recognize the dignitary harm inflicted by a racial insult."[17] It is to the injury-to-feelings argument that we next turn.

"Fighting words" and injured feelings

A commonplace argument framed by advocates of "anti-harassment" codes is that racist, sexist and homophobic speech injures the feelings of minorities and women on campus, thereby causing the targeted groups to be unable to participate equally with white heterosexual males in university activities. Among the proponents of this viewpoint cited in *Illiberal Education* are two officials of the University of Michigan: President James Duderstadt, who said, "We're weighing speech against the hurt feelings of minorities";[18] and law professor, who contended that "racial epithets are not speech. They are bullets. They can be outlawed in the same way that bank robbery can be outlawed."[19] Duderstadt and Aleinikoff were key players in the development of Michigan's policy on "Discrimination and Discriminatory Harassment," which defined as punishable "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status."[20]

Michigan's policy, and others similar to it, sought constitutional support in the 1942 *Chaplinsky v. New Hampshire* decision of the Supreme Court of the United States. *Chaplinsky* held that government could regulate "fighting words," defined as "face to face words" which "by their very utterance (1) inflict injury or (2) tend to incite an immediate breach of the peace."[21] Michigan sought to punish hate speech which "injured" students by creating "a hostile, intimidating or demeaning environment for educational pursuits."[22]

However, the Michigan policy did not take into account several Supreme Court decisions which modified *Chaplinsky* by deleting from the "fighting words" definition the idea that offensive language may "inflict injury" on the listener. First, in *Cohen v. California* (1971), the Supreme Court held that a jacket bearing the antiwar slogan "Fuck the draft," while possibly offensive, was neither legally obscene nor directed at any individual so as to provoke a violent reaction from that individual.[23] Second, in *Gooding v. Wilson* (1972) the court overturned as overly broad a Georgia statute whose definition of

"opprobrious words or abusive language, tending to cause a breach of the peace" made punishable the utterance of racist and vulgar language.[24] (In 1978 the U. S. Seventh Court of Appeals, citing *Gooding*, struck down three ordinances intended to prevent Nazis from peacefully marching in Skokie, Ill. The court ruled that a display of the swastika, as an expression of the Nazis' political beliefs, could not be enjoined simply because it was "offensive."[25]) Finally, in *Texas v. Johnson* (1989) the Supreme Court ruled that the burning of an American flag was symbolic political speech that could not be punished by the state of Texas in the absence of a violent reaction in the flag-burner's audience.[26] "Thus, in order to constitute fighting words, speech must not merely breach decorum but also must tend to bring the addressee to fisticuffs."[27]

U.S. District Judge Avern Cohn found Michigan's policy to be fatally flawed on two counts: (1) it was overly broad, making sanctionable not only hateful epithets intended to provoke violence but also protected speech, i.e., classroom discussion of controversial research on racial differences; and (2) it was vague, forcing speakers to guess at what language is sanctionable and what is not. However, Cohn expressed sympathy for "the victims' experience of a loss of liberty in a society that tolerates racist speech";[28] and in an addendum to his opinion cited an article by Stanford University law professor Mari Matsuda[29] as possibly providing a rationale for "anti-harassment" codes that would pass constitutional muster. *Illiberal Education* also refers to Matsuda's paradigm, which will be discussed in the next section of this paper.

The university-as-special-place argument

The "special qualities" of the university environment have been cited by officials attempting to formulate and justify "anti-harassment" speech codes. For example, James T. Laney, president of Emory University (whose advocacy of such codes is cited in *Illiberal Education*), has written that

We misconstrue the nature of the university when we operate as if it were

> value-neutral. Educators are by definition professors of value. Through education we pass on to the next generation not merely information but the habits and manners of our *civil* society....What we intend is not to curb free speech but to make it more probable....People do not feel free to speak when they are bullied--when the message they hear is not "I disagree with you" but "I wish you didn't exist."....There should be no prior restriction of anyone's *civil* address in classrooms or public meetings. We need to teach adversaries how to speak to each other as members of the same community, each worthy of respect. (Emphasis added)[30]

To this attitude that universities should teach civility based on certain values (i.e., that racism, sexism and homophobia are morally wrong), Matsuda adds the perspective that many minority students are adjusting to living away from home, in the environment of an unfamiliar, e.g., Caucasian, culture. She further reasons that when minorities are the targets of racist speech, they are a "captive audience" and are denied full participation in university life.[31] She argues--without citing empirical evidence--that racist speech has "debilitating effects" on its victims, including "fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide"; and that such speech leads directly to violence and an upsurge of hate crimes.[32] Matsuda contends that, in contemplating the problem of hate speech on campus, university officials must take into account these social "facts"; they should not merely debate First Amendment "abstractions."

Her proposed solution is based on a group libel or vilification theory. Matsuda would make actionable speech in which:

(1) The message is of racial inferiority;

(2) The message is directed against a historically oppressed *group*; and

(3) The message is persecutorial, hateful and degrading. (Original emphasis)[33]

In order to avoid opening "the dreaded floodgates of censorship," Matsuda would require prosecutors to prove that a speaker understood the offensive character of his or her words--the "historical message" of discriminatory speech-- yet intentionally used them against a targeted audience .[34]

However, Matsuda's paradigm is problematic for three reasons. First, while the Supreme Court has permitted schools to control the activities of students which interfere with other students' educational opportunities ,[35] these decisions have upheld time, place and manner restrictions, not restrictions based on the content of the message. In a number of cases, the Supreme Court has established the principles that no government "can prescribe what shall be orthodox" in matters of opinion[36] and that there is no such thing as a false idea.[37]

Second, in view of recent decisions by the Supreme Court, the concept of group libel or vilification, as embodied in some state statutes, offers doubtful legal support for a speech code based on Matsuda's rationale. In its only ruling on group libel, the Supreme Court in 1952 upheld an Illinois statute that made it a crime to disseminate or exhibit in a public place anything which "portrays depravity, criminality, unchastity or lack of virtue of a class of citizens or any race, color, creed or religion" or which exposed the "citizens of any race, color, creed or religion to contempt, derision or obloquy."[38] Subsequent decisions of the court, however, have brought many types of defamation under the protection of the First Amendment, so that today unnamed individuals in a group are generally not permitted to sue for libel if the group is larger than 25 persons.[39]

Third, Matsuda specifically omits whites from groups of people who should be protected from hateful speech. Indeed, she writes that "hateful and verbal attacks upon dominant group members by victims is permissible."[40] Therefore, it is possible that a black person could call a white person a "honky" but that a white could not call a black a "nigger." Moreover, Matsuda never defines what an "oppressed" group is. For example, could Polish-American students be considered an "oppressed" group? Matsuda's paradigm seems to require university administrators to establish a point system to evaluate what group has been discriminated against to the greatest extent and for the longest period.

The analogy to Title VII of the Civil Rights Law

Nevertheless, with the exception of Matsuda's reference to antiquated group libel law, the University of Wisconsin, in approving its anti-discrimination code in June 1989, reflected almost exactly Matsuda's definition of discriminatory speech and her intent or "scienter" test. (The code was approved as part of a "Design for Diversity" intended to increase the number of minority students at the university and to create greater awareness of their cultures.) Several Wisconsin law professors, including the aforementioned Richard Delgado, apparently felt that the scienter test would help the university's policy survive a constitutional challenge.[41]

The university also sought to justify its policy by analogy to Title VII of the Civil Rights Act of 1964, which prevents sex discrimination in employment. Proponents of this analogy, including Delgado and law professor Charles R. Lawrence of Stanford University--another of D'Souza's "New Censors"--have argued that the Supreme Court's 1954 *Brown v. Board of Education* decision was essentially a case about speech, with the court holding that "segregated schools were inherently unequal because of the *message* that segregation conveyed." (Original emphasis)[42]

Lawrence writes that *Brown*

> recognized that black children didn't have equal educational opportunity to learn and participate in the school community if they bore the additional burden of being subjected to humiliation and psychic assault contained in the message of segregation. (Minorities among) university students bear an analogous burden when they are forced to live and work in an environment where at any moment they may be subjected to denigrating verbal harassment and assault....Whenever we decide that racist speech must be tolerated because of the importance of maintaining social tolerance for all unpopular speech, we are asking blacks and other subordinated groups to bear the burden for the good of all.[43]

After nine students at Wisconsin campuses had been disciplined under the code in 1989-90,[44] the expected constitutional challenge came from the *UWM Post*, one of the

university's student newspapers.

In declaring the Wisconsin code unconstitutional, U. S. District Judge Robert Warren held that speech which creates an "intimidating, hostile or demeaning environment" does not "necessarily tend to incite violent reaction."[45] Because the code "covers a substantial number of situations where no breach of the peace is likely to result, the rule fails to meet the requirements of the fighting words [*Chaplinsky*] doctrine" and is overly broad.[46]

In addition,Warren rejected the Title VII analogy between the university and the workplace. He reasoned that "agency theory"--wherein an employer is responsible for the actions of its agents--did not apply because universities are not employers and its students are not its "agents."[47] Even if agency theory applied to this case, it would not make the Wisconsin code constitutional because Title VII "is only a statute [which] cannot supersed the requirements of the First Amendment."[48]

Addressing the university's claim that generalized hate speech is no essential part of the exposition of ideas in an educational setting, Warren reminded the regents that "the Constitution does not make the dominance of truth a necessary condition of freedom of speech"[49] and that "the First Amendment protects speech regardless of its intellectual support."[50]

While recognizing that increasing diversity "is clearly a constitutionally permissible goal" for a university, Warren ruled that

> the UW rule does as much to hurt diversity on Wisconsin campuses as it does to help it. By establishing content-based restrictions on speech, the rule limits the diversity of ideas among students and thereby prevents the "robust exchange of ideas" which intellectually divese campuses provide.[51]

Discussion

Warren's decision leaves open to universities the promulgation of codes that would cover offenses such as the intentional infliction of emotional distress and "fighting words" that would insure a violent reaction. But such narrowly drawn codes "would reach such a small amount of the problems that would occur that they would be ineffective," said Elsa K. Cole, general legal counsel for the University of Michigan.[52] Nevertheless, it is clear that some diversity proponents, especially those at private universities such as Stanford, will continue to push for regulations which punish categories of offensive speech which fall outside the protection of the Michigan and Wisconsin court cases.

In any case, an essential question remains: Are anti-discrimination codes--which establish a double standard of the First Amendment--*educationally* appropriate means to establish nondiscriminatory attitudes?

One university president who thinks they are not appropriate--and to whose thinking D'Souza does not refer--is Robert M. O'Neil of the University of Virginia. In addition to limiting speech codes only to "recognized and established exceptions to the First Amendment--e.g., obscenity and speech that creates "a clear and present danger" of violence--O'Neil offers the following options "befitting an academic community."

> A faculty and administration that loudly condemn racial caricature and ethnic slur abridge no student's freedom of speech. An educational program, whether optional or required, designed to increase tolerance and eliminate bigotry enhances free expression and inquiry. Inviting formal complaints from people aggrieved by demeaning speech violates no civil liberty as long as punishment reaches only conduct, not thoughts or words.[53]

O'Neil and Harvard law professor Alan Dershowitz argue for rigorous adherence to a single standard of speech and its regulation. As Dershowitz writes,

> If a society--whether it be a government or a university, gives the power of censorship to any one group, it may not deny others with equally plausible claims. [For example, i]f students who are offended by South

> African apartheid can close that idea out of the marketplace, then by what principle could other students who are offendied by abortion, atheism, homosexuality, feminism, sexism, socialism or capitalism be denied the power to close out those ideas?[54]

Supreme Court Justice Louis Brandeis, defending in 1927 freedom of speech for American communists (Whitney v. California), wrote that "If there be time... to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."[55] How much better for the student with racist or sexist attitudes to express them openly and be challenged rather than repress them and remain unchanged. Universities are places where disputes ought to be resolved through public discussion.

Civility can never be mandated by laws or campus regulations. Unfortunately, as D'Souza demonstrates in *Illiberal Education*, the more absurd regulations of "political correctness"--i.e., the University of Connecticut's rule against "inappropriately directed laughter"[56] --may actually be damaging to the goals of any movement to accomplish the larger goal of a more representative society. Professor Alexander Bickel once said that "The more we define freedom, the less freedom we have,"[57] and that, of course, is the danger of too much codification and too much litigation as people try to live their lives in the university community.

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[35] *Tinker v. Des Moines Indepedent Community School District*,393 U.S. 503 (1969); *Healy v. James*, 408 U.S. 169 (1972); *Widmar v. Vincent*, 454 U.S. 263 (1981).

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[45] Id., p. 1176.

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[47] Id., p. 1177. "Agency theory" developed out of *Meritor Savings Bank v. Vinson,* 477 U.S.. 57, in which the Supreme Court ruled that under Title VII an employer has a duty to take appropriate corrective action when it learns of pervasive illegal harassment among its employees or "agents."

[48] Id.

[49] Id., p. 1175, quoting *American Booksellers Association, Inc. v. Hudnut*, 771 F. 2d 323, at 330 (7th Cir., 1985), which overturned Indianapolis' attempt to ban pornography on the grounds that it harms women and therefore violates their Fourteenth Amendment rights.

[50] Id., p. 1178, quoting *Collin v. Smith*, supra, in which the Village of Skokie was prevented from enjoing a march by American Nazis.

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